No. 99-1067

In The

# Supreme Court of the United States

INTERCONTINENTAL BULKTANK CORPORATION and MARITIME OVERSEAS CORPORATION,

*Petitioners,*

versus

LEE SELICO,

*Respondent.*

**On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit**

## BRIEF IN OPPOSITION


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## RESPONSE TO QUESTIONS PRESENTED

1. The General Maritime Law of the United States recognizes the right of plaintiff, who was a seaman injured in an accident which the jury found was caused by the unseaworthiness of the defendants' vessel, to recover prejudgment interest on the portion of the award caused by such unseaworthiness. Congress has not addressed this issue and the Jones Act is not the exclusive remedy for injured seamen.

2. There is no split in the circuit courts in cases such as the present one in which prejudgment interest was awarded by the jury, pursuant to a specific jury interrogatory, solely on the portion of their award caused by the unseaworthiness of defendants' vessel. Every circuit court would have rendered the exact same verdict.

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## STATEMENT OF THE CASE

This matter involves serious shoulder injuries suffered by plaintiff, Lee Selico, a merchant seaman employed by the defendants on their vessel, the SS OVERSEAS ALASKA, as a result of an accident which occurred on May 28, 1987. (App. A., App. p. 2a). The accident occurred while plaintiff was working in the engine room with his immediate supervisor, the Second Engineer, in a dangerous area located on top of the starboard boiler of the vessel, and he was injured while following the direct orders of this supervisor. As a result of this injury plaintiff was required to seek medical treatment, which revealed sufficient damage to his shoulder that it required surgical repair. (App. A, App. p. 4a).

Plaintiff thereafter filed suit against the defendants, asserting an unseaworthiness claim under the General Maritime Law of the United States and a negligence claim under the Jones Act, 46 U.S.C. § 688, *et seq.*, in the Civil District Court for the Parish of Orleans. The trial of this matter was conducted on September 30, 1997. During the trial, plaintiff testified concerning the cause of the accident and the extent of his injuries, he presented testimony of his treating physician and submitted extensive exhibits concerning the accident and his medical treatment. Defendants called no witnesses and only submitted exhibits relating to wage loss.

After receiving Jury Charges following the close of evidence, the jury returned a verdict in favor of plaintiff on all counts in the total amount of $142,845.01. They further found that the SS OVERSEAS ALASKA was unseaworthy and that defendants were negligent and, in

response to a specific jury interrogatory,[1] concluded that 50% of their award was based upon unseaworthiness and 50% of their award was based upon negligence.[2]

However, due to confusion on the part of the jury, in error they failed to award plaintiff prejudgment interest. Plaintiff therefore filed a Motion for Judgment Notwithstanding the Verdict Only on the Issue of the Failure of the Jury to Award Pre-Judgment Interest, seeking prejudgment interest solely on the portion of the award caused by the unseaworthiness of the SS OVERSEAS ALASKA. Defendants opposed this Motion generally on the same basis as presented in this Petition. The trial

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[1] A copy of the Jury Interrogatories have been attached as Appendix A, pp. 1a-3a. The specific Interrogatory in question is No. 6.

[2] Throughout their Petition the defendants have used the term "equally" to describe the jury's allocation of the award between unseaworthiness and negligence. While technically correct the use of this word may be misleading and not a proper representation of the jury's decision. While the percentage findings of unseaworthiness and negligence were the same amount, the defendants seem to imply that there was no real basis for the jury to allocate their award between the two theories and thus the award was not based on the evidence. This implication cannot be further from the truth as plaintiff presented ample evidence on which the jury was able to base their allocation, made in response to a specific jury interrogatory. The jury reviewed the uncontroverted evidence and made a factual determination of the cause of the accident, which they were not necessarily required to do. Had the jury been unable to allocate their award or concluded that the unseaworthiness of the vessel was more or less than 50% of the cause of the accident, plaintiff would likewise have no basis on which to object to the jury's decision.

court granted plaintiff's Motion and awarded prejudgment interest on $8,922.51 in past lost wages, which was one-half of the lost wage award, and on $62,500.00, which was one-half of the general damage award.

The defendants then appealed the entire verdict in this matter. On appeal, the Louisiana Fourth Circuit Court of Appeals affirmed the trial court's verdict,[3] including the trial court's granting of the JNOV on the issue of prejudgment interest, in its entirety. They held that the jury's determination that the vessel's unseaworthiness and defendants' negligence both contributed to plaintiff's accident was a reasonable decision and supported by the record. (Appendix A, App. pp. 7a-9a, 12a). They went on to dismiss every claim asserted by the defendants in the present Petition, specifically including their claim that prejudgment interest should not apply to awards under General Maritime Law for unseaworthiness.

The defendants then filed an application for writ of *certiorari* to the Supreme Court of Louisiana, seeking review of the same issues once again. On September 24, 1999, in a six to one vote, the Supreme Court of Louisiana denied defendants' writ application. (Appendix C, App. p. 21a).

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[3] Defendants point out that one member of the Louisiana Fourth Circuit Court of Appeals dissented to the decision. However, the member dissented only on the basis that the jury's failure to award prejudgment interest in this matter should not have been contested by the trial judge as it was a factual finding, he did not dissent with the panel's discussion concerning the right of the jury to award prejudgment interest in admiralty cases. (Appendix A, App. pp. 13a-15a).

## REASONS FOR DENYING THE PETITION FOR WRIT OF *CERTIORARI*

The General Maritime Law of the United States has recognized the right to recover prejudgment interest in all actions, including in personal injury actions brought on the basis of unseaworthiness. Despite defendants' repeated reference to unrelated issues in an effort to mislead this Court into believing otherwise, there is not one single case which has refused to recognize this fact. The only argument stated by the defendants which is true on this issue concerns a limited situation which does not apply to the facts of this matter.

That lone situation involves an action where an injured seaman combines his unseaworthiness action with a negligence action brought pursuant to the Jones Act and the action is tried at law to a jury and the jury either is not asked whether to award prejudgment interest or they are unable to allocate their award between unseaworthiness and negligence. The reason why this situation is an exception to the general rule that prejudgment interest should be awarded in maritime actions is that in this situation, and in this situation only, Congress has addressed the issue.

In this matter, since the jury was asked to award prejudgment interest and they were able to determine that 50% of their award was based upon unseaworthiness, the granting of prejudgment interest on this portion of the verdict was allowed, if not required, to be awarded.[4] In an apparent attempt to persuade this Court

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[4] As stated by this Court in *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 115 S.Ct. 2091, 2095, 132 L.Ed.2d

that this case falls under that one exception, defendants have distorted the evidence presented at trial, mischaracterized the lower courts' findings and, without directly stating so, seem to be asking this Court to review the factual determinations made by the jury.

The current state of the law in this area is so well-settled that the defendants themselves clearly concede that no court has ever accepted their argument. Furthermore, despite defendants' unsupported contentions to the contrary, there is no split in the circuit courts in situations such as the present one. Under the facts of this case which were presented at trial, and in the procedural posture of this case as it is before this Court, regardless of where this case could or would have been filed, every court, without exception, would have reached the exact same result. As such, the defendants Petition for Writ of *Certiorari* must be denied and they should be required to pay Mr. Selico the funds to which he has long been entitled.

**1. The jury's allocation of their award between negligence and unseaworthiness, which is supported by the evidence presented at trial, is not subject to review by this Court.**

While the defendants have not come out and directly asked the Court to review the jury's allocation of their

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148 (1995), prejudgment interest should be awarded absent "peculiar" or "exceptional" circumstances, none of which are present in this action. Therefore, once the issue of prejudgment interest was submitted to the jury, they were virtually required to award prejudgment interest on the portion of their award based on the unseaworthiness of the SS OVERSEAS ALASKA.

award between unseaworthiness and negligence, since such a review is clearly improper, they nevertheless make repeated claims that there was no basis for jury's liability allocation. We believe this is simply an attempt to make a veiled argument in the alternative.

Defendants' primary argument is that there can be no prejudgment interest in any maritime personal injury action. However, recognizing that there is no legal authority for this argument, they further assert the alternative argument that the jury's allocation was improper by distorting the facts of this case in an effort to fit it into the one exception to the granting of prejudgment interest in admiralty cases. Throughout their Petition, defendants continually refer to the jury's verdict in such a way as to have this Court believe that there was no evidence to support it. These repeated attempts by the defendants to mischaracterize the findings of the jury are improper and should be rejected by the Court. The jury was the sole factfinder in this matter and their decision, specifically including their liability allocation between unseaworthiness and negligence, should not be addressed by this Court. As this Court has previously held, in admiralty cases tried to a jury, the provisions of the Seventh Amendment[5] apply and require that the jury's findings not be disturbed on appeal. *See A. & G. Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962); *International Terminal Operating Co., Inc. v. N. V. Nederk. Amerik Stoomv. Maats.*, 393 U.S. 74 (1968). As this Court also stated in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 114-115 (1963), *citing Tennant v. Peoria & P. U. R. Co.*, 321

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[5] U.S. Const. amend. VII.

U.S. 29, 35 (1960) in an action brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

As this limitation was further explained by this Court in *A. & G. Stevedores*, "neither we nor the Court of Appeals can redetermine the facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' " *A. & G. Stevedores* at 359.

During the trial of this matter plaintiff presented several separate and distinguishable negligent acts or defective conditions which could have caused his accident.[6] In response, the defendants presented no contradictory evidence and absolutely no testimony. The jury

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[6] The sufficiency of the facts and evidence presented to the jury was extensively examined and defendants' argument based

was then given proper instructions[7] concerning unseaworthiness and negligence and applied these charges to the facts of this case, rendering a verdict properly based on the evidence and testimony. The evidence presented at trial, including the testimony that plaintiff had been ordered by his supervisor to work in a dangerous area which was not a normal work surface, that this area was slanted and covered with soot and moisture which the defendants had allowed to accumulate, and that he was ordered by his supervisor, who was working with him on top of the boiler at the time of the accident, to climb off the boiler in order to retrieve additional tools, all supported the jury's findings that the accident was caused by a combination of the unseaworthiness of the SS OVERSEAS ALASKA and the negligence of the defendants. The uncontroverted testimony and evidence also provided the jury with sufficient evidence on which to support their separate apportionment of damages between the two causes of action.

The jury's findings were thereafter reviewed by the Louisiana Fourth Circuit Court of Appeals,[8] which

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thereon was rejected by the Louisiana Fourth Circuit Court of Appeals, as reflected in their decision reproduced in Appendix "A" to defendants' Petition, and as such will not be repeated here.

[7] No objection to the jury charges, instructions or jury interrogatories was made by the defendants at trial, in any appeal, or in this Petition.

[8] Under Louisiana Law, an appellant has the right to a *de novo* appeal of all issues raised in the trial court, including the findings of fact. *See* Rule 1-3 of the Louisiana Uniform Rules for the Courts of Appeal.

affirmed the findings in their entirety. The Louisiana Supreme Court subsequently denied defendants' Petition for *Certiorari*, further reinforcing the decision that the jury's findings were appropriate and not reviewable. Since the jury's findings have been properly reviewed by the Louisiana appellate courts, the basis for those factual findings is not subject to review by this Court. Therefore, the analysis of defendants' Petition must necessarily start with the established fact that 50% of Mr. Selico's damages were caused by the unseaworthiness of the SS OVERSEAS ALASKA.

**2. Prejudgment interest is part of the damages to which an injured seaman is entitled under the General Maritime Law of the United States.**

At least since this Court's decision in *Del Col v. Arnold*, 3 U.S. (3 Dall.) 333, 334 (1796),[9] admiralty and maritime courts have awarded prejudgment interest as part of the compensation to which an injured party is entitled. As stated in the most recent Supreme Court case on this issue, *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.* "[t]hroughout our history, admiralty decrees have included provisions for prejudgment interest." *City of Milwaukee* at 2095. Moreover, the award of prejudgment interest is "designed to make the plaintiff whole." *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 335, 108 S.Ct. 1837, 1843 (1988). As this Court stated in

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[9] *See also: The Umbria*, 166 U.S. 404, 421 (1796); *The Manitoba*, 122 U.S. 97, 101 (1887); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 562-63 (1818); *The Anna Maria*, 15 U.S. (2 Wheat.) 327, 335 (1817).

*City of Milwaukee*, "the essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." *City of Milwaukee* at 2095. Furthermore, "prejudgment interest is not awarded as a penalty; it is merely an element of just compensation." *Id.* at 2096. As the lower court held in this matter, since the defendants had the use of the money they were found by the jury to owe, "[i]t . . . would be 'inequitable not to make appropriate compensation for delay in discharging the obligation." (Appendix A, App. p. 11a, *citing: Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 594 (2nd Cir. 1961), *cert. denied*, 368 U.S. 989, 82 S.Ct. 606 (1962)).

The underlying purpose for requiring that defendants pay prejudgment interest as part of the compensation they owe to an injured seaman is to encourage defendants to resolve litigation as soon as is possible and to promptly provide the injured worker with reimbursement for their injuries. As stated by Judge Blackmun in his dissent in *Monessen*, a rule such as that requested by the defendants against payment of prejudgment interest would create an incentive for the employer to stall the litigation and postpone the judgment as long as possible. *See Monessen* at 345 (Blackmun, J., dissent).

In addition, "an award of prejudgment interest helps achieve the goal of restoring a party to the condition it enjoyed before the injury occurred." *City of Milwaukee* at 2096. *See Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55 (5th Cir. 1981); *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020, 87 S.Ct. 731 (1967). As stated by the Seventh Circuit in *Hillier v. Southern Towing Co.*, 740 F.2d 582, 585 (7th Cir. 1984), "the

doctrine of *restititio in integrum* controls the determination of the appropriateness of the award of prejudgment interest. The doctrine of *restititio in integrum* provides that a plaintiff is to be placed in the position previously enjoyed prior to the time he or she sustained damages; the plaintiff is to be made whole, in monetary terms."

In this matter, the defendants arguably have had use of money rightfully owed to Mr. Selico since 1987, and they continue to have use of these funds. Prejudgment interest in this matter is based on the portion of the award attributed to unseaworthiness, that being $71,242.50, for the 10.4 years prior to trial. It should be noted, however, that under the market conditions as they have existed over the more than ten years during which defendants had use of these funds before trial, as well as during the two and one-half years they have had use of the funds since the verdict, even conservatively invested the funds would have generated significantly more than the amount of interest defendants owe as prejudgment interest. As a result, despite defendants' argument that this interest represents some sort of windfall, the defendants will clearly have earned a significant profit on the interim investment of plaintiff's funds.

Most importantly, by accepting defendants' position, this Honorable Court would abandon the beneficent policies which underlie the protections afforded seamen which have been fashioned by the Courts and Congress. Approval of defendants' argument would encourage callous employers to ignore injured employees and remove any encouragement to make their injured workers whole

as promptly as possible. Liability for prejudgment interest provides such encouragement by removing the incentive to delay the litigation.

### 3. Maritime law allows a court to award prejudgment interest when unseaworthiness is found by a jury.

Throughout their Petition, the defendants apparently have made the erroneous assumption that, since Mr. Selico qualifies as a "Jones Act seaman", the protections provided under the General Maritime Law of the United States do not apply equally to him. Apparently, the defendants base their entire argument against prejudgment interest around this incorrect assumption, citing to the 'uniformity principle' espoused in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), and its progeny.

In an attempt to convince this Court that their interpretation is correct, they present what they term a "syllogism" which states that "(1) Through its incorporation of FELA, the Jones Act does not allow prejudgment interest (at least when the action is at law). (citation omitted) (2) The courts cannot award a Jones Act seaman greater or different damages than are permitted by the Jones Act. (citation omitted); (3) Therefore, prejudgment interest is not allowed a Jones Act seaman whether his recovery is under the Jones Act or under the general maritime law" (Petition for Writ of *Certiorari* at 9-10.)

This "syllogism," however, is completely fallacious and, as such, leads to a gross misinterpretation of the law. Specifically, in order for this "syllogism" to work, one must first accept the assumption that, simply because

plaintiff qualifies as a Jones Act seaman, this status necessarily eliminates all other recovery on some basis other than the Jones Act with the incorporated FELA[10] law. This statement cannot be further from the truth.

The General Maritime Law of the United States existed well before either the FELA or the Jones Act were enacted. This law governed all incidents and accidents which occurred on the high seas and were directly fashioned from England's legacy of laws concerning shipboard accidents. In a further effort to assist injured seamen in recovering for the injuries caused by the negligence of their employers and the persons for whom they are responsible, for which an action under General Maritime Law did not exist at that time, Congress enacted the Jones Act. The Jones Act addressed this issue but was never designed to be the sole basis on which injured seamen could seek redress for their injuries.[11]

By incorporating FELA into the Jones Act, Congress was able to bring a tradition of laws which allowed an injured worker to sue for injuries caused by the negligence of a co-employee. However, a seaman is not a railroad worker. Since railroad workers never had the

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[10] Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.*

[11] "The Jones Act envinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." (citations omitted). *Miles* at 29. *See Anglada v. Tidewater, Inc.*, 752 F.Supp. 722, 724 (E.D.La. 1990)["No scholar or court has ever intimated that adoption of the Jones Act indicates Congress intended to cast aside the general maritime law of unseaworthiness. . . . [i]t does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."]

separate ability to make a claim for unseaworthiness or to bring a claim for maintenance and cure, claims which are uniquely maritime in nature and which have always carried the right to recover prejudgment interest, these issues were never addressed by Congress when they incorporated FELA into the Jones Act. As such, the ability to make such claims under the General Maritime Law, and to collect prejudgment interest on such claims, continued after the enactment of the Jones Act and are not inconsistent with it. Accordingly, in addition to the right to bring an action under the Jones Act for injuries caused by the negligence of his employer or co-employees, unlike his railroad brethren an injured seaman also has the right to bring an action for injuries caused by the unseaworthiness of a vessel and can recover under either theory, or under both, depending upon the cause of the accident. Therefore, the Jones Act was designed merely to supplement the General Maritime Law and has never been considered by any court to override the protections provided under such laws. Any suggestions by the defendants to the contrary are patently wrong and should be rejected by this Honorable Court.

Furthermore, while it has been determined that *Miles* eliminated the recovery of prejudgment interest in cases based solely on the Jones Act which are tried at law to a jury, that issue is not before the Court in this matter. It is this exact failure of defendants to distinguish between recovery under the Jones Act and recovery under General Maritime Law which is the reason why their position is

patently incorrect and has never been accepted by any court.[12]

This same argument was presented unsuccessfully by the defendants in *Melancon v. Petrostar Corporation*, 762 F.Supp. 1261 (W.D.La. 1991). The defendants in the *Melancon* case, like the defendants here, argued that the Supreme Court's decision in *Miles* mandates dismissal of the plaintiff's claim for prejudgment interest under the General Maritime Law. *Melancon* at 1262. The court disagreed "with Petrostar's overly broad interpretation of the *Miles* decision." *Id.* The Court then held that "the *Miles* decision does not affect a seaman's right to obtain prejudgment interest where he has succeeded in proving his claim for unseaworthiness."[13] *Id.* at 1263.

The attempt to assert this same argument was also made in *Anglada v. Tidewater, Inc.*, by the same law firm which represents the defendants in the present matter. The court rejected the defendants' argument in that case, holding that "*Apex Marine*, however, appears to have no effect on Mr. Anglada's request for prejudgment interest." *Anglada* at 725. The court then referred to defendants' argument as "wishful thinking." *Id.* at 726. Finally, the court stated that:

> when Congress adopted the Jones Act, its purpose was to provide seamen with a remedy

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[12] "By and large, the lower courts have failed to even address the argument urged herein." (Petition for Writ of *Certiorari* at 12.)

[13] In a footnote the district court then cited to *Anglada v. Tidewater, Inc.*, stating that "we largely agree with the Anglada court's reasoning." *Anglada* at 1263, n. 2.

> against its employers for injuries caused by the negligent acts of fellow crew members. Congress did not intend to cast aside the remedies available to seamen under the general maritime law. It is worth repeating that *Apex Marine* explicitly declares, 'The Jones Act evinces no general hostility toward recovery under maritime law. It does not disturb the seamen's general maritime claims for injuries resulting from unseaworthiness.' Prejudgment interest predates the Jones Act. It is the Court's snapshot in time. Thus, it is beyond the reach of *Apex Marine*. (Citations omitted).

*Id.* at 726.

While defendants recognize that *Anglada* specifically addressed their arguments and dismissed them, they attempt to distinguish it by analyzing the cases cited by the *Anglada* court, including *The Scotland*, 118 U.S. 507, 30 L.Ed. 153, 6 S.Ct. 1174 (1886), *The President Madison*, 91 F.2d 835 (9th Cir. 1937), *Thompson Towing & Wrecking Association v. McGregor*, 207 F. 209 (6th Cir. 1913) and *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 562-63 (1818), incomprehensibly asserting that they support their arguments. However, even a minimal review of these cases reveals that defendants are misinterpreting them.

First, as for *The Scotland* and *The President Madison*, the defendants seem to argue that these cases do not support the *Anglada* court's decision as they involved only property damage, on which defendants agree that prejudgment interest is available. However, defendants fail to clearly state the underlying basis for the holdings in these cases. While these cases did not involve personal injury claims, they were both brought under the same

maritime law under which personal injury actions are brought. This law provides for recovery in personal injury cases and also provides for recovery of prejudgment interest. The *Anglada* court recognized this fact and properly awarded prejudgment interest.

In addition, in this Court's latest decision involving prejudgment interest in admiralty cases, *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, which is not even addressed by the defendants, this Court did not limit its decision only to property damage cases. While it is true that the issue of prejudgment interest in personal injury actions was not before this Court in the *City of Milwaukee* case, the discussion of prejudgment interest as part of the General Maritime Law is directly analogous to personal injury actions. This decision clearly indicates that the awarding of prejudgment interest under the General Maritime Law is permitted and was proper in this matter.

As for the defendants' discussion of *The Amiable Nancy*, their attempts to distinguish it are likewise based on an improper reading of the case. First, the suit in that case was filed as the result of "the gross and wanton seizure of a Haitian vessel near the island of Antigua by the *Scourge*, an American privateer." *City of Milwaukee* at 2095, *quoting The Amiable Nancy* at 546-547, 558. While several of the crew on the vessel suffered personal injuries during the seizure, as the injuries were caused by the actions of persons from the privateer and not due to any condition of the vessel, no claim for unseaworthiness could have been made. In fact, the case did not involve an action against the injured seaman's employer but was instead filed against the owners of the American privateer. Second, while prejudgment interest was granted

on the property damage caused during the seizure, no claim for prejudgment interest on the personal injuries portion of the claim was ever made, nor is there a basis on which to determine if it was even submitted at the trial court. In addition, the issue of prejudgment interest on the injury portion of the case was not appealed to the circuit court and, as this Court specifically limited its review to whether the circuit court improperly rejected any items allowed by the district court,[14] this case did not even address the issue of prejudgment interest on the personal injury portion of the verdict. Therefore, since prejudgment interest in property damage cases has not, as discussed above, been limited only to such cases, the *Anglada* court's reliance on this case is justified.

Finally, the defendants follow their improper analysis of *The Amiable Nancy* with the completely erroneous statement that "[t]he law was clear prior to 1920, that prejudgment interest was not available in admiralty suits for personal injury," supporting this quote with cites to two pre-1920 cases[15] which, upon careful reading, no longer apply. (Petition for *Certiorari* at 14.) Defendants' contentions to the contrary notwithstanding, neither *The ARGO* nor *Union Steamboat Company v. Fitzgibbons* rejected prejudgment interest in personal injury actions on the ground that such recovery was not part of the General Maritime Law. They only refused to award prejudgment interest due to the formerly accepted premise that such

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[14] *The Amiable Nancy* at 558.

[15] *The ARGO*, 210 F. 872, 875 (9th Cir. 1914) and *Union Steamboat Company v. Fitzgibbons*, 261 F. 768, 770 (7th Cir. 1919).

interest was not permitted until the amount of the damages was judicially determined. However, the basis for this argument has since been rejected and it is now well established that awarding prejudgment interest only on judicially determined damages is no longer valid. As this Court stated in *City of Milwaukee* "the liquidated/unliquidated distinction has faced trenchant criticism for a number of years." *City of Milwaukee* at 2096. *See Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 444 (1st Cir. 1991) ["a plaintiff's immediate loss and the usual delay in payment may warrant the granting of prejudgment interest on unliquidated tort claims, including claims for pain and suffering."] Furthermore, this Court stated that "[i]t has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one." *City of Milwaukee* at 2096, n. 9. (citations omitted). *See Hillier v. Southern Towing Co.*, at 586, n. 4 ["The distinction between "liquidated" and "unliquidated" damages has not been determinative in admiralty cases."](citations omitted).

Accordingly, defendants' reliance on *The ARGO* and *Union Steamboat Company v. Fitzgibbons* is misplaced, as is their complete misstatement of the law that prior to 1920 prejudgment interest was not available in personal injury actions. Prejudgment interest has always been part of the General Maritime Law of the United States and is an element of the damages which can be awarded in personal injury actions.

**4. There is no split in the federal circuits concerning the awarding of prejudgment interest under General Maritime Law or under the facts of this case and every court, without exception, would have decided the present matter in the exact same manner.**

In order to have their Petition accepted, defendants must further convince this Court that there is a split in the federal circuit courts concerning the issue of prejudgment interest. Having no support for their argument that prejudgment interest is not an element of damages recognized under the General Maritime Law, they have made the similarly unsupportable argument that the law in this area is somehow not settled. Furthermore, the various examples cited by defendants which attempt to show that various courts would decide the issue differently are inapplicable to this case.

The actual posture of this case on the issue of prejudgment interest under General Maritime Law is remarkably different than the examples presented by the defendants. Prejudgment interest was awarded by the trial court only on the portion of the award which was specifically allocated by the jury to unseaworthiness. Further, plaintiff never requested interest on the portion of the award attributed to negligence. Consequently, defendants' arguments concerning what other jurisdictions would do in situations involving prejudgment interest awards rendered when findings are based on negligence, when cases are tried at law or in admiralty, when the issue was not presented to the jury or when an award was not apportioned between unseaworthiness or negligence, are all irrelevant and not pertinent to the issues before this Court, nor do they represent some split in the

circuit courts. Clearly, as to the simple issue raised here of whether prejudgment interest is recoverable in an unseaworthiness action brought pursuant to the General Maritime Law where the jury apportions the damages, it is clear beyond peradventure that the answer has consistently been in the affirmative.

A review of the various circuit courts[16] which have addressed similar situations reveals that under the facts of the present matter they all would render the exact same verdict. In fact, the issue is so well-settled that it is acknowledged by the defendants in their Petition.[17] As for the remaining circuit courts, research of their case law does not reveal a single case in which, under the facts of the present matter, an award of prejudgment interest on the portion of the award attributed to the unseaworthiness of a vessel has been denied based on a finding that prejudgment interest is not a recoverable element under maritime law.

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[16] *See Domangue v. Penrod Drilling Co.*, 748 F.2d 999 (5th Cir. 1985); *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981); *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 444 (1st Cir. 1991); *Robinson v. Pocohontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732 (6th Cir. 1986); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046, 133 L.Ed.2d 663, 116 S.Ct. 708 (1996).

[17] "By lower courts, we mean not only the lower courts below, but all lower federal and state courts which, without exception, allow a Jones Act seaman to recover prejudgment interest if the judgment is not based on negligence." (Petition for Writ of *Certiorari* at 4.)

Nevertheless, and despite the aforementioned overwhelming and uniformly accepted law, the defendants attempt to argue that the case of *Magee v. U.S. Lines, Inc.*, 976 F.2d 821 (2nd Cir. 1992) somehow is inconsistent. In fact, *Magee* does not apply to the present matter. Specifically, the defendants have mischaracterized the posture of the *Magee* case as it was before the district court, mistakenly stating that it was "at law". While it is true that the case was tried before a jury, the award of prejudgment interest was actually made by the Court pursuant to an agreement between the parties to have the court, rather than the jury, decide this issue. *Id.* at 822. As such, the prejudgment interest issue was decided by the court as if sitting in admiralty, so that the district court's award of prejudgment interest on both the unseaworthiness and the Jones Act was not improper under the current law.

Furthermore, even if it is accepted that the *Magee* case somehow improperly awarded interest on the portion of the award attributed to negligence, it still does not apply to the matter which is before this Court. As we have repeatedly stated, this matter correctly involves only the award of prejudgment interest on the unseaworthiness portion of an award rendered by a jury who was asked to award such interest. There is not one case which holds that an award under these circumstances is somehow improper and thus there can be no conflict among the circuit courts.

## CONCLUSION

Every argument asserted by the defendants in their Petition was presented to and rejected by the trial court, the Fourth Circuit Court of Appeals and the Louisiana Supreme Court. They present no new evidence and no new case law which would warrant reversing the opinion of the lower courts on these issues. Their further attempts to persuade this Court that there is a split among lower courts concerning prejudgment interest, relying on their improper categorization of one distinguishable case from the Second Circuit Court of Appeals, should also be rejected. Finally, their veiled suggestions that this Court should also review the facts decided by the jury in this case must also be refused.

Under the facts of this matter, there is no doubt that prejudgment interest on the portion of the award attributed to unseaworthiness, or $71,242.50, was proper in all respects and we respectfully request that this Court deny defendants' Petition for Writ of *Certiorari*.

Respectfully submitted,

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CHARLES P. NEELY, ESQUIRE
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**APPENDIX A**

**Civil District Court for the Parish of Orleans**

**State of Louisiana**

**No. 89-898** **Divison "N"** Section 8

*Lee Selico*

*versus*

*Intercontinental Bulktank Corp. And Maritime Overseas Corporation*

**Filed:** _____ _____

**Deputy Clerk**

(Filed Sept. 30, 1997)

**JURY INTERROGATORIES**

1. Do you find from a preponderance of the evidence that the vessel SS OVERSEAS ALASKA was unseaworthy on or about May 28, 1987?

   ✓ YES _ NO

   **If your answer to Interrogatory Number One was "NO," please skip to Interrogatory Number Four.**

2. If your answer to Interrogatory Number One was "YES," do you find from a preponderance of the evidence that the unseaworthiness of the vessel SS OVERSEAS ALASKA was the proximate cause of any injuries to the Plaintiff, Lee Andre Selico?

   ✓ YES _ NO

3. **If your answer to Interrogatory Number Two was "NO," please skip to Interrogatory Number Four.**

   Do you find a preponderance of the evidence that the Plaintiff is entitled to recover pre-judgment interest in this action?

   _ YES ✓ NO

4. Do you find from a preponderance of the evidence that the Defendants, Maritime Overseas Corp. and Intercontinental Bulktank Corp., were negligent on or about May 28, 1987?

   ✓ YES  _ NO

   **If your answer to Interrogatory Number Four was "NO," please skip to Interrogatory Number Seven.**

5. If your answer to Interrogatory Number Four was "YES," do you find from a preponderance of the evidence that such negligence played any part, no matter how slight or how small, in causing or contributing to the injuries, if any, sustained by the Plaintiff, Lee Andre Selico?

   ✓ YES  _ NO

   **If you answered "NO" to both Interrogatory Number One and Interrogatory Number Four, please date and sign the jury interrogatory form and return to the courtroom.**

6. If you answered "YES" to both Interrogatory Number One and Interrogatory Number Four, please state, in percentage terms, how much of your award is based on the negligence of the defendants and how much of your award is based on the unseaworthyness of the SS OVERSEAS ALASKA. If you cannot determine how much of your damage award is based on the negligence of the Defendants and how much of your award is based on the unseaworthyness of the vessel, please state that on this form.

   | | |
   |---|---|
   | Negligence | 50% |
   | Unseaworthiness | 50% |

7. What amount of money, if any, do you find from a preponderance of the evidence, adequately and fairly compensates the Plaintiff for his damages?

Answer in dollars and cents:

| | |
|---|---|
| Past Wages | $17,845.01 |
| Past, present, and future suffering, disability, mental anguish, and loss of capacity for the enjoyment of life: | $125,000.00 |

*You are instructed that the amount of money, if any, should not be reduced by any amount you may find that the Plaintiff was himself negligent, if any.*

8. Do you find from a preponderance of the evidence that the Plaintiff was negligent in a manner that contributed to causing his injuries, if any?

_ YES ✓ NO

**If your answer to Interrogatory Number Eight was "NO," please sign and date this form and return to the courtroom.**

9. If your answer to Interrogatory Number Eight was "YES," please express, in terms of a percentage, the extent, if any, that Plaintiff's negligence contributed to causing his own injuries.

_____ %

New Orleans, Louisiana, this 30 day of Setpember, 1997.

/s/ George W. Johnson
*Foreperson*